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No. 131.

IN THE

Supreme Court of the United States

OCTOBER TERM 1965.

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

v.

ALLEGHANY CORPORATION, ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY,

Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION.

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Of Counsel.

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Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION.*

Opinions Below.

The opinions of the Court of Appeals are reported at 344 F. 2d 571. The oral remarks of the District Court (Ryan, C. J) in lieu of a written opinion are printed at R. 59-60, 62-69, 71, 74, 75, 81-82.

Questions Presented.

1. Where an independent and undominated board of directors, whose integrity and good faith are admitted, has

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* The portions of the Transcript of Record on these consolidated reviews of the proceedings in the District Court on petitioners' application for leave to intervene are printed at R. 8-35 and 52-83. The portions of the Transcript of Record of the proceedings in the Court of Appeals on the appeal from the order denying intervention are printed at R. 2378-2392.

determined that it is in the best interests of the corporation not to apply to this Court for a writ of certiorari to review a judgment dismissing an action charging that certain other directors and officers had procured a settlement of a stockholders' action by fraud, may two preferred stockholders intervene as of right under FRCP 24(a)(2) for the purpose of filing such a petition?

2. Where the stockholders seeking intervention are admittedly "knowledgeable" and have followed this litigation with "close attention", is a motion to intervene for the purpose of petitioning for a writ of certiorari timely, when made 4 days before the time to do so expires?

Federal Rule Involved.

The part of Rule 24(a)(2) upon which the petitioners rely is as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *."

Statement.

When this action was commenced in 1960 in the United States District Court for the Southern District of New York as a derivative stockholders' action in the right of Alleghany, the plaintiffs were John D. Murchison and Clint W. Murchison, Jr. The defendants were the present respondents, Allan P. Kirby, Charles T. Ireland, Jr., and Fred M. Kirby, together with one Randolph Phillips who is

no longer in the case.* At that time the Murchisons were in a bitter fight with the respondent Allan P. Kirby for control of Alleghany and the litigation was but a part of that struggle (218 F. Supp. 167). The attorneys for the Murchisons were the same attorneys who now represent the two petitioners.

The complaint in this action charged that the individual respondents had procured the settlement of consolidated stockholders' actions pending in Supreme Court, New York County, by fraud (218 F. Supp. 164). The complaints in those New York actions related to transactions dating back to 1949 and 1950. The settlement occurred in 1959. Under its terms Alleghany has been paid $3,300,000 and the voting stock of Investors Diversified Services, Inc., (hereinafter "IDS") which the Murchisons then owned, was exchanged for non-voting stock of IDS. This gave Alleghany voting control of IDS, the value of which has been assessed at various figures exceeding $5,000,000 (R. 21, R. 2300).**

While this action was pending and before the trial, the Murchisons, following a proxy fight, gained voting control of Alleghany. They thereupon substituted Alleghany for themselves as the plaintiff but with the same attorneys to prosecute the action. The final judgment dismissing the action on the merits after a lengthy trial was appealed from to the Court of Appeals. Initially and on May 19, 1964, that Court in a 2-1 decision affirmed the judgment of dismissal of the District Court (333 F. 2d 327, R. 2370).

The petition for rehearing to that Court, made with the unanimous approval of the Board of Directors of Alleghany, including the two Kirbys and Ireland, was granted (R.

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* The judgment of dismissal as to him was not appealed from.

** Judge Dawson's opinion in the District Court traces the history of the negotiations culminating in this settlement in great detail at 218 F. Supp. 172-178.

2372). On January 12, 1965, that Court *en banc* by a 4-4 vote adhered to the judgment of affirmance (340 F. 2d 311, R. 2377).

After this *en banc* decision, the Board of Directors of Alleghany met, deliberated and determined that a continuation of the litigation was not in the best interests of the corporation and accordingly voted to proceed no further with it. That action was taken at a meeting of the Board on February 9th, 1965 by an independent quorum and majority of the Board owning or representing over 2,000,000 shares or approximately 20% of the voting stock with a value in excess of $20,000,000 and after considering the opinion of independent counsel (R. 20, 22, 74; Ex. C; R. 47-49).* The respondent directors withdrew from the meeting when this matter was considered and voted upon (R. 20).

In arriving at its decision, the Board took many factors into account (R. 20-21). These were all valid and substantial reasons which any diligent board of directors would have to weigh in deciding what to do. The Board realized that Alleghany had been embroiled in costly and bitter litigation for more than a decade and that the only fruitful result of the numerous actions in both State and Federal courts was the settlement under attack. The directors were faced with the fact that the attack had been unsuccessful throughout the litigation. They also realized that the granting of certiorari and even a reversal by this Court would not end this litigation or assure Alleghany of a worthwhile recovery but would be only the beginning of another long and expensive course of litigation with no

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* If petitioners' prophecy of a recovery of $60,000,000 were correct, this group would realize an enhancement of their equity of $10,000,000 (R. 2384). The Court of Appeals realized that this group would not let such an opportunity slip by if they had any confidence in it (R. 2384).

assurance of ultimate success (R. 27). There would be further court proceedings in the District Court, including a trial of the issues raised in the case at bar, a trial on the fairness of the 1950 exchange transaction, in which Alleghany might well be unsuccessful, and a trial of the difficult and complicated question of damages. Appeals would be likely whatever the results of the trials might be. Such litigation could involve the estate of Robert R. Young and Robert W. Purcell since they were alleged to be the primary participants in the alleged fraud and because no personal dereliction on the part of the respondent Kirby had been shown (R. 21, 27-28). Additionally, if the *Zenn* settlement was set aside, the question would arise as to the disposition of control of IDS. This control was a very significant part of the *Zenn* settlement for the value of Alleghany's IDS investment was in excess of $115,000,000 and this investment constitutes over half of Alleghany's total assets. The directors did not wish to risk losing such a valuable asset (R. 21, 27-28). In short, the directors realized that Alleghany, already harassed and handicapped by ten years of expensive and disruptive litigation, could look forward only to more of the same without any assurance that at the end of such litigation it would be better off than it was under the *Zenn* settlement and certainly with no assurance that the $60,000,000 recovery so blandly assumed by the petitioners herein, could be achieved (R. 21). The directors knew when they made their decision that this very litigation had consumed a great deal of management's time and effort for a decade and had literally paralyzed the affairs of the corporation for at least five years from 1955 to 1960. They knew that continuance of this unsuccessful litigation would continue to deprive Alleghany stockholders of the concentration of management on Alleghany's business (R.

21). The reasons prompting the Board's decision were substantial—indeed compelling. The District Court agreed that it was time to end the power struggle that had plagued the corporation for over a decade (R. 62-63).

Nothing in petitioners' moving papers in the District Court attacked the honesty and good faith of the decision of the Board. To the contrary, the petitioners conceded in that Court that "... we don't question the integrity of the men involved ..." (R. 79). Moreover, petitioners did not challenge the allegation in the answering papers that the directors who voted to drop the litigation were not dominated by Kirby (R. 22). Indeed, in the Court of Appeals, petitioners' counsel refused to characterize the Board as "dominated" by the Kirby group (R. 2385, footnote 3). Nowhere in the record do the petitioners controvert the fact that the Board of Directors acted as it did for the valid and substantial reasons set forth above. Despite this record, and indeed probably because of it, the petitioners argue in this Court that control of the stock of Alleghany by Kirby resulted in control of the Board of Directors and inadequate representation of the stockholders. The manifest unsoundness of this argument is established *infra* (pp. 10-12).

Chief Judge Ryan denied the motion to intervene, holding that applicants have had and do have adequate representation and that the application was not timely (R. 82). The Court of Appeals affirmed on both grounds (R. 2384-2386).

ARGUMENT.

POINT I.

The denial of petitioners' motion to intervene as of right was correct and proper because the representation of their interest by an independent, undominated board of directors was adequate.

It is well settled that the determination of a board of directors of a corporation made in good faith not to prosecute or not to defend a claim in litigation cannot be superseded by a disagreeing stockholder.

In *Swanson* v. *Traer*, 249 F. 2d 854 (7th Cir. 1957), the Court affirmed a dismissal of a complaint in a derivative stockholder's action where it appeared that the corporation acting through an independent majority of its board of directors had decided not to prosecute a claim against certain allegedly wrongdoing directors.* After an exhaustive review of the relevant authorities, including decisions of this Court, the opinion observed (p. 858):

> "To be consonant with the reasoning and policies in the cases above cited we must hold that if a board of directors, a majority of which are admittedly honest and have not been involved in the alleged wrongs, refuses a demand to bring suit, then the complaining shareholders' judgment shall not be substituted for that of the directors."

Petitioners seek to avoid the impact of the decision in *Swanson* v. *Traer* by arguing (Br. p. 22) that the "standards" articulated in that case are inapplicable because

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* For the earlier history of this case, see *Swanson* v. *Traer*, 230 F. 2d 228 (7th Cir. 1956), particularly at pp. 235-7.

they "are, of course, different from the criteria of Rule 24(a)(2) when shareholders are seeking to intervene in an existing action". Petitioners cite no authority for this "authoritatively" expressed opinion. But in *Continental & C. Trust & S. Bank* v. *Allis-Chalmers Co.*, 200 Fed. 600, 611, the court in denying a stockholder permission to intervene said:

> ". . . before he can be heard at all, he must be prepared to make a showing identical with that which would enable him, as a stockholder, to commence an independent suit to assert or protect a corporate right."*

The rule declared in *Swanson* v. *Traer* that dissenting stockholders may not substitute their judgment concerning the conduct of corporate litigation for that of the directors is the rule in New York, where Alleghany has its principal place of business and where the Board of Directors took the action under attack. See *Blaustein* v. *Pan American Petroleum & Transport Co.*, 293 N. Y. 281, 303-304 (1944).

The right of directors acting in good faith to manage the affairs of a corporation necessarily extends to and includes the right to control litigation. In *Mendelson Bros. Factors, Inc.* v. *Sachs*, 253 App. Div. 270, aff'd 279 N. Y. 604 (1938) the Court held that the plaintiff shareholder was barred from maintaining his action against certain directors of the corporation where the corporation through an independent majority of the board and in good faith settled the claims against these directors.

The basis for intervention is "inadequate representation" by the board of directors. This, in turn, is established

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* Petitioners (Br. p. 22) quote a passage from *Swanson* v. *Traer* stating that if the board of directors is subject to the control of the alleged wrongdoers, a stockholder may sue. That rule is inapplicable here. The record is plain that there was no such control.

only by a showing of corruption, fraud or dishonesty. See, for example, *Pyle-National Co.* v. *Amos,* 172 F. 2d 425, 427 (7th Cir. 1949).

In *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683 (1961), individual members of the American Society of Composers, Authors and Publishers (ASCAP) had sought to intervene as of right in a proceeding to modify a consent decree previously entered in a government anti-trust suit against ASCAP. This Court found that while appellants "may be" bound within the meaning of Rule 24(a)(2) as to the external affairs of the Society, there was no showing that representation by ASCAP was inadequate.

> "The issue of inadequacy of representation could arise on this phase of the case only on some showing that ASCAP, which ostensibly has the same interests as appellants on this aspect of the litigation, was in fact conducting the litigation in bad faith, collusively, or negligently. No such contention has been made." (366 U. S. at p. 692, n. 4)

Petitioners' attempts to distinguish *Sam Fox* are without merit. They contend (Br. pp. 17-19) that the instant case is similar to the *inter sese* aspect of *Sam Fox* and that intervention should be allowed to protect the interests of the shareholders which petitioners claim are different from the interests of the directors. But unlike the *inter sese* aspect of *Sam Fox,* the instant case does not involve a dispute between different classes of members of an organization over the percentage of representation each group should have on the board of directors. Here, the interests of all other shareholders of Alleghany and of these directors who owned or represented companies that owned approximately 20% of the outstanding voting stock of Alleghany are the same with respect to this litigation.

The District Court held that petitioners could not

substitute their wishes for the honest judgment of an independent board of directors acting in good faith (R. 75). The Court of Appeals agreed stating that it knew of no proposition of law that permits shareholders, absent allegations of bad faith, collusion or negligence, to intervene as of right, to continue litigation that the board of directors has decided to terminate (R. 2384).

The petitioners argue (Br. pp. 9, 13) that because a Board of Directors, elected after respondent Kirby acquired voting control of Alleghany, voted to discontinue the litigation after the 4-4 affirmance by the Court of Appeals, representation is inadequate and petitioners are entitled to intervene as a matter of right to continue the litigation contrary to the determination of the board. They take this position even though, in the Court of Appeals, they disavowed any charge that the members of the board who voted to drop the litigation were dominated by the respondent Kirby (R. 2385, footnote 3). Their argument is plainly unsound. It equates voting control of the stock of Alleghany with control of the board. The fact that Kirby's voting control of the stock resulted in the election of the members of the board does not establish that they are under his control. That is a fact which must be shown and has not been shown in this case. To the contrary, the petitioners in the District Court did not question the integrity and good faith of the board and did not suggest that its members were dominated by Kirby. And the facts are that (1) the petition for rehearing *en banc* was authorized by the very Board of Directors which decided not to petition for a writ of certiorari, (2) the director-defendants voted with the independent directors to authorize the petition for rehearing and (3) all of this happened after Mr. Kirby's return to control. These facts were before the District Court, which properly felt that they strongly evidenced that representation was adequate (R. 67).

Petitioners would give any stockholder the absolute right to subject *every* decision of a board of directors involving a controlling shareholder and the corporation to judicial review. Clearly this is not the law. See for example, *In Re New York Rys. Corp.*, 82 F. 2d 739 (2d Cir.), *cert. den.* 298 U. S. 687 (1936) where the court held that a transaction between a corporation and its majority shareholder is not voidable merely because the majority shareholder had the power to, and did in fact, elect the board of directors which approved the transaction.

The correct rule was succinctly stated by the court in *Blish* v. *Thompson Automatic Arms Corp.*, 30 Del. Ch. 538, 64 A. 2d 581 (1948) as follows (p. 606):

> "... The appellant's assertion of fraud based upon the theory that since Maguire was President and majority stockholder of TAAC he necessarily dominated and controlled the Board of Directors are insufficient observations to impugn the integrity and independence of the Directors."

To the same effect are:

> *Cowell* v. *McMillin*, 177 Fed. 25, 43;
> *Rogers* v. *Nashville & St. Louis Railway Co.*, 91 Fed. 299, 313;
> *Bell* v. *Fred T. Ley & Co.*, 278 Mass. 60;
> *Blaustein* v. *Pan American Petroleum & Transport Co.*, 293 N. Y. 281, 302-303.

Legislative approval of the foreging general principles is embodied in Section 713 of the recently enacted *New York Business Corporation Law.* Under that section a transaction between a corporation and a director or officer cannot be successfully attacked unless the directors who

approved the transaction acted fraudulently, collusively or negligently.*

The cases cited by petitioners do not support their claim to intervention as a matter of right. *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D. C. Cir. 1944), *cert. den.* 323 U. S. 777 (1944) was a zoning case, not a stockholder's action. The *statute* gave the property owner the right to contest a zoning regulation. It was held that the property owner could assert that right by intervention in an action after the zoning board declined to appeal an adverse judgment against it which would necessarily affect the rights of the property owner. This was not a derivative right; it was a primary personal right created by statute.

Similarly in *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F. 2d 387 (1962) the intervening company had a personal right and interest separate and distinct from the Government to uphold the federal regulations under attack which restricted the large companies and favored the smaller ones. Again, there was nothing derivative about the rights being asserted.

Petitioners rely on *Park & Tilford* v. *Schulte*, 160 F. 2d 984 (2d Cir. 1947) and *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9th Cir. 1953). These two cases involved §16(b) of the Securities Exchange Act of 1934 which confers an unusual cause of action upon a corporation, enforceable by a stock-

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* In their brief in the Court of Appeals, petitioners for the first time attempted by inference to question the degree of disinterest of the nine directors of Alleghany who voted to terminate the litigation. They repeat that effort here (Br. pp. 12-13), although it is not part of the question they have presented to the Court (Br. p. 2). Obviously, we cannot now make the factual showing which we could and would have made in the District Court if petitioners had attacked the independence or good faith of the Alleghany board in that Court. Nevertheless, the record does not support petitioners veiled and oblique attack on the good faith and independence of the Alleghany board. See Appendix.

holder for "short swing" profits by a corporate "insider". The *sui generis* nature of §16(b) is well recognized. Intervention considerations applicable to §16(b) causes of action have no relevance in this case.

The rationale of *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9th Cir. 1953) supports our view. There the court expressly stated that the general rule was that the board of directors determined whether to litigate but that Section 16(b) created an exception to that general rule. In this connection, the court said (pp. 466-467):

> "* * * Appellees rely upon the general rule that a corporation's board of directors may, subject to the exercise of good faith and a reasonable business judgment, determine whether the best interests of the corporation and its stockholders would be served by engaging in litigation. This argument ignores the limitations imposed upon the usual discretion of a board of directors by the language of §16(b). Any stockholder has a right to institute suit if the corporation fails to do so, regardless of the good faith or reasonable business judgment of the board of directors. Moreover, once it commences litigation, the company's duty is not merely to determine diligently *whether* prosecution of the suit should continue, but, rather, the company has a duty *diligently to prosecute* the suit."

Petitioners state (Br. p. 16) that the Court in *Pellegrino* "held that refusal of the Board to appeal the action against the corporate employees satisfied the inadequate representation requirement of Rule 24(a)(2) without reference to the mandate of Section 16(b)". This is not so. As shown by the foregoing quotation from the opinion, the Court in *Pellegrino* reasoned that the petitioner there need not show fraud, domination or negligence to intervene in a Section 16(b) case because the petitioner would not have had to

show fraud, domination or negligence to commence the action after a refusal by the corporation to do so.

Petitioners' reliance on *Park & Tilford* v. *Schulte,* 160 F. 2d 984 *cert. den.* 332 U. S. 761 (1947) is misplaced. This case, like the *Pellegrino* case, is not controlling here because the decision rested on the special considerations involved in a 16(b) action. Furthermore, it appeared (160 F. 2d 988) that the defendants and their father dominated the affairs of the corporation.

Molybdenum Corp. v. *International Mining Corp.,* 32 F. R. D. 415 (S. D. N. Y. 1963) merely held that when a stockholder wanted to assert rights under Section 16(b) by intervention, he must nevertheless move to intervene pursuant to FRCP 24(a)(2).

It is plain, therefore, that the determination of the Board is dispositive of the litigation; that petitioners have no right to set their wishes against that determination; that the Section 16(b) cases and others cited by petitioners are inapplicable and that, on the record before him, Judge Ryan had no choice but to deny the motion. As he so aptly stated to counsel for petitioners (R. 67):

> "* * * while you, as a zealous advocate, might not feel that a decision of the board of directors of Allegheny now made not to proceed further by filing a petition for a writ is wise, you cannot supplant your decision on business as well as legal matters for their own judgment and the advice they get from their own independent counsel."*

Petitioners suggest (Br. p. 9) that an affirmance by this court would create a precedent enabling "one in control of

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* In *Stadin* v. *Union Electric Company,* 309 F. 2d 912 (8th Cir. 1962), cert den., 373 U. S. 915 (1963), it was held that mere difference of opinion among attorneys is not of itself "inadequate representation".

a corporation which has a suit against him to end that suit by his power to name the Board". But this could only be achieved if the members of the Board so named were pliant and subservient, lacked integrity and voted contrary to their own best judgment. To repeat, the record in this case presents no such situation.

POINT II.

The application to intervene was untimely.

The timeliness of an application to intervene is a matter committed to the discretion of the District Court, whose decision should not be reversed on appeal absent a clear showing of abuse of discretion. *Simms* v. *Andrews,* 118 F. 2d 803 (10th Cir. 1941). The District Court found that petitioners' motion to intervene here was not timely (R. 66, 76, 82). The Court of Appeals affirmed this determination (R. 2384-2385).

The application for intervention, coming after affirmance of final judgment by the Court of Appeals, sitting *en banc,* requires an even stronger showing of timeliness than would otherwise be necessary. Such tardiness calls for denial of intervention. *Basle Theaters, Inc.* v. *Warner Bros. Pictures Dist. Corp.,* 24 F. R. D. 476, 477 (W. D. Pa. 1959). See also *Morin* v. *City of Stuart,* 112 F. 2d 585 (5th Cir. 1939); *McKenna* v. *Pan American Petroleum Corp.,* 303 F. 2d 778 (5th Cir. 1962).

The decision not to seek certiorari in the present case was made on February 9, 1965. Immediately thereafter it was communicated to the firm of Townley, Updike, Carter & Rodgers which represents petitioners. It was conceded by petitioners' counsel, at the hearing before Judge Ryan, that petitioners "have followed the fortunes or ill fortunes of the Alleghany Corporation through this litigation with

pretty close attention", that they were advised long ago that it was based upon a challenge of the settlement of a state court lawsuit, and that they became aware of the principal steps in this lawsuit since its institution as they occurred (R. 55, 64-65). Specifically, the petitioners knew that Mr. Kirby regained control of Alleghany (R. 69) and that was back in December 1963. But these knowledgeable ladies (R. 55) made no attempt to intervene then or at any time thereafter until 4 days before the expiration of the time within which to apply for a writ.

In sustaining the finding of the District Court that petitioners' attempt to intervene was untimely, the majority opinion of the Court of Appeals said (R. 2385):

> "* * * As we have noted, there are no allegations or claims that the Board of Directors acted in bad faith, fraudulently or dishonestly, but we shall assume, *arguendo,* that the applicants' interests may have been or are inadequately represented despite the absence of such charges because the Board of Directors was acting under what counsel, at oral argument, picturesquely characterized, but without anything more than his *ipse dixit,* as 'the brooding presence' of the Kirby group.
>
> "But even that *arguendo* assumption, when considered with the background of the applicants' asserted long-time interest in this litigation and the fact that the Kirby group regain [sic] direct control of the Corporation as long ago as December, 1963, would compel us to agree with the District Judge's findings and to conclude that he acted well within the bounds of his discretion in determining that the application to intervene—made sixteen months later —was untimely."

Petitioners' argument is that their action here was timely because they were not advised of the Board's

February 9, 1965 decision until Sunday, April 4, 1965.* But there was no duty on the part of the Board to inform of its decision. Petitioners have conceded the absence of any such duty (R. 61, 70).

For the first time in this Court (Br. p. 5, Petition, p. 5) the petitioners refer to an application made by the firm now representing them, but at the time in question representing Alleghany, to the Court of Appeals for the Second Circuit for an order authorizing them to petition for a rehearing or allowing them to take other steps for the continued prosecution of the appeal which Alleghany had lost. They suggest that this was what led to the Board's decision to authorize the application for a rehearing *en banc*. There is no basis in the record for such a belated suggestion. Indeed petitioners' counsel indicated the contrary before Judge Ryan (R. 59).

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* The record does not reveal the deliberations of these knowledgeable petitioners when on Sunday, April 4, 1965 they decided that they should attempt to apply for a writ of certiorari. We are only told that it came as a surprise to them that Alleghany was not going to make such an application (R. 61). They must have been knowledgeable indeed to be aware of this refinement of federal appellate practice. It is hard to believe that when they authorized the application these ladies also knew that they could not personally profit by a successful outcome except to the extent that the value of their investment in preferred stock might be nominally enhanced whereas they were becoming personally liable for all of the costs and expenses of further proceedings. These costs and expenses have already exceeded any phantom profit to them which would result from success. We are constrained to conclude that this is still another skirmish in the battle of tycoons with the independent directors in the middle.

Conclusion.

The judgment of the Court of Appeals for the Second Circuit affirming the order of the District Court denying petitioners' motion for leave to intervene should be affirmed.

Respectfully submitted,

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February 21, 1966.

APPENDIX.

All references hereinafter to stock ownership and principal occupation are based on the May 1965 Alleghany proxy statement (Ex. C; R. 45-49) which speaks as of March 1, 1965—less than a month after the Board voted to terminate the litigation.

(1) Mr. Van Pelt was a director of Alleghany in 1949, and was a named but unserved co-defendant in *Zenn*. He is not involved in the present action and never has been. If this Court should reverse, he would not be a defendant in this action. He has had no business relationship of any sort with Mr. Kirby (R. 22). He was the owner of 500 shares of Preferred and 2,000 shares of Alleghany Common stock (Ex. C; R. 49).

(2) and (3) Messrs. Rabe and Hill were members of the Alleghany board in 1959. When they voted to approve the 1959 settlement, it had already been approved by the Referee and by the New York State Supreme Court. It has never been asserted, that their action in this regard was improperly motivated. Indeed, these directors were dropped as defendants in this action in 1962 when the Murchisons, who were then represented by petitioners' present counsel had the Corporation take over the action (R. 2). Mr. Hill, for many years, was a partner in an investment banking firm in Philadelphia (Ex. C; R. 47). He had no business relationship with Mr. Kirby (R. 22). Messrs. Rabe and Hill owned 100 shares of Alleghany Preferred stock and 800 shares of Alleghany Common stock, respectively (Ex. C; R. 47, 49). In addition, Mr. Rabe had a beneficial interest in a holding company which owned 1,300 shares of Alleghany Preferred, 5,000 shares of Alleghany Common and 500 shares of IDS Class A Common stock (Ex. C; R. 49).

(4) The only tie specifically asserted to exist between Mr. Kirby and any director is the reciprocal voting agreement between Mr. Kirby and the Nationwide Companies, of which Mr. Lincoln was president for many years. The Nationwide Companies owned in the aggregate 789,400 shares of Alleghany Common stock, 9,200 shares of Alleghany Preferred stock, and 85,100 warrants for Alleghany Common stock (Ex. C; R. 48). They are, of course,

mutual insurance companies subject to regulation by the insurance departments of every state in which they do business. Mr. Lincoln has never been involved in this or any other litigation having to do with Alleghany affairs. His only interest in the subject matter of this litigation is the interest which the companies he represents have as stockholders of Alleghany.

(5) Mr. Taylor was a director of Alleghany in 1961 and was reelected as a director in 1963. He has had no connection with any litigation involving the subject matter of this case. Mr. Taylor owned 7,500 shares of Alleghany Common stock (Ex. C; R. 49). He had no business relationship with Mr. Kirby (R. 22).

(6-9) Messrs. Odell, Hunt, Deer and Davies are said to be tied to Kirby because they "all represent corporate interests that participated in the stock transactions which returned Mr. Kirby to 'direct control'." This is certainly an ingenious way of saying that these four men represented publicly-held companies which had large investments in Alleghany stock.

Mr. Odell was the chairman of Allied Properties, a large real estate, ranching and hotel operating corporation which owned 450,180 shares of Alleghany Common stock (R. 22, Ex. C; R. 48). This accounts for his presence on the board. He had no personal dealings with Mr. Kirby (R. 22).

Mr. James S. Hunt controls Coral Ridge Properties, Inc., a publicly-held company which has constructed and operates large real estate holdings in the city of Fort Lauderdale, Florida. Coral Ridge owned 103,800 shares of Alleghany Common stock, 3,000 shares of Alleghany Preferred and 8,000 shares of the Class B Common stock of IDS (R. 22; Ex. C; R. 47).

Mr. James W. Deer is a lawyer. His firm was counsel in various matters for Gamble-Skogmo, Inc. which owned 500,000 shares of Alleghany Common stock (R. 22). Mr. Deer was elected to the Alleghany board in 1962 along with Mr. Bertin C. Gamble to represent Gamble-Skogmo on the Alleghany board.

Mr. Walter S. Davies was vice-president and treasurer of Gamble-Skogmo, Inc. He took Mr. Gamble's place on the Alleghany board at the December, 1963 stockholders' meeting (Ex. C; R. 47).